

Marketing the Union: Some Feminist Perspectives

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Introduction

The pivotal role of the internal market in EC law has important implications for any feminist perspective on the area. While feminist perspectives on law have offered a set of powerful critiques of many aspects of law, and these insights have been applied in relation to key features of the legal system in many jurisdictions, in relation to EC law, the contribution made by feminist lawyers and scholars has been relatively limited. There has been sustained feminist commentary on EC social policy (in particular relating to equality between women and men at work and in relation to social security); however, relatively little has been written about other areas of EC law which employs feminist scholarship or which seeks to examine the origin and/or impact of EC law from a feminist stance. The aim here is to examine some of the central characteristics of the European internal market law from a feminist perspective. The analysis will then shift to the new player in the integration game, the European Union. This legal entity is heavily dependent on the existing law of the internal market, and the feminist critique offered of the legal regime in the internal market will be carried over to the European Union.

It might be argued that EC law is sexist, given the overwhelming preponderance of men in positions of power within its institutions. For example, in a study of the Court of Justice the authors observe before giving an outline of the judges' biographical details that these will deal exclusively with men because, 'a woman has still to be appointed to this office, although ... the French, with true republican "*égalité*", chose a woman for appointment as advocate general in 1981'¹. However, changing the number of women within the top ranks of the Community's legal and political order would not necessarily change the nature of the system in the absence of a major culture shift. Therefore, this essay will use two other strategies, the claim that law is male, in that it employs modes of reasoning and perception that are culturally associated with masculinity, and that it operates as a gendering mechanism. These elements will be developed once the role of the internal market in EC law is considered.

The Internal Market

The Treaty of Rome established the European *Economic* Community and although the name was changed to the European Community in 1993, the creation and maintenance of a common or internal market remains close to the heart of the Community's activities. The culture of the market and principles of market efficiency and competition are central to the creation of the internal market, and to the legitimacy of the legal order founded on it. Article 7a EC defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.' However, Kirsten Scheiwe notes: 'a definition of the market concept cannot be derived from a mere description of market policies', and suggests that, '[i]t is not simply a 'market logic' that affects and fuels the dynamics of these developments, but a selective logic (with a gender dimension) which excludes or includes certain policy areas according to criteria of relevance other than ill-defined 'market-connectedness'². This critique is an important one; and it will be argued here that the dominant conception of the internal market reflects a set of male norms and assumptions. In this sense, it is claimed that EC law is male because its assumptions, values and modes of reasoning are associated with masculine traits in our culture.

It is first necessary to delineate the scope of the market. The institutions of the EC have, for the most part, taken the view that any activity and any object can be assimilated to the market. In identifying the objects and subjects of the EC internal market's legal order, a very broad approach can be discerned. For example, in 1984 the Commission stated that, 'Contrary to what is widely imagined, the EEC Treaty applies not only to economic activities but, as a rule to all activities carried out for remuneration, regardless of whether they take place in the economic, social, cultural (including in particular information, creative or artistic endeavours and entertainment), sporting or any other sphere'³. This approach embraces many individuals and institutions which would not necessarily be seen by those who are unfamiliar with EC law as participants in the market.

The Court of Justice has also taken a broad view of the scope of the market, as is clear from its jurisprudence on what constitutes 'goods' for the purpose of the free movement rules contained in the Treaty. The Court's approach does not flow automatically from any internal rationale of EC law, found within the norms and the jurisprudence of the rules of EC law, and what emerges from a critical consideration of its caselaw is that the Court defines the market, it does not discover it. This can be seen in *Commission v. Belgium*⁴ where the Commission claimed that an import ban imposed by the Walloon Regional Authority on waste products was incompatible with Article 30 EC. The ban was intended to stop Wallonia from being the final halting site in "waste tourism", the movement of by-products of industrial processes from wealthier regions to poorer regions for disposal or treatment. Amongst the arguments raised by Belgium was that when waste can no longer be recycled or reused, and so has

no commercial value, it cannot come within the scope of the rules on free movement of goods. The Advocate General took the view that non-recyclable waste constituted "goods" within the Treaty rules because, although it had no intrinsic value, it could form the subject of commercial transactions in that waste disposal companies are paid to dispose of it⁵. The Court of Justice took a similarly robust view, holding that objects transported over a national border to effect a commercial transaction must be subject to Article 30 EC, irrespective of the nature of the transactions⁶. Clearly, the Court's approach gives pre-eminence to a market paradigm, ignoring critics who assert that, 'The central problem is that the EEC fails to differentiate between different kinds of goods. One *should* look to the nature of the good because all goods are not the same. After all, some commercial transactions have a negative environmental impact'⁷. That critique treats this case as a local anomaly. However, when the masculine nature of EC law is identified, a systematic failure can be recognised. A basic feature of EC law is its powerful impulse towards market deference⁸, and that failure cannot be addressed until EC law adopts other values, of connection and solidarity, and a different epistemology, contemplating 'masculine' assumptions of atomistic, de-contextualized objects and individuals as well as a 'feminine', holistic vision.

It should be noted that it is not necessarily desirable to be placed *outside* the market. Patricia Williams points out that the market is a plastic construct whose precise boundaries vary over time. She goes on to observe that it is, nonetheless, constant in one feature;

whether something is inside or outside the marketplace ... has always been a way of valuing it. Where a valued object is located outside the market, it is generally understood to be too "priceless" to be accommodated by ordinary exchange relationships; if the prize is located within the marketplace, then all objects placed outside become "valueless". Traditionally, the *Mona Lisa* and human life have been the sort of objects removed from the fungibility of commodification, as priceless. Thus when black people were bought and sold as slaves, they were placed beyond the bounds of humanity.⁹

This insight, that to be excluded from the market is not to share even the limited benefits which it offers, reminds us that it is not the market itself which is the only source of concern for those casting a critical eye over EC law from a feminist perspective. Instead, our attention should also be on the way in which the market could become the only source of valuing others and the world around us. This issue might be addressed in several ways. If the exclusion of the feminist perspectives on sources of value canvassed above is an integral part of the formation of the market concept, a real challenge to EC law's dependence on the market may require a fundamental transformation of the presumptions used to construct that concept. It may be, however, that feminist perspectives militate towards abandoning the market because the concept cannot endure the pressures created by such transformational pressures and/or because the market cannot deliver what feminists require of it.

The European Union

The adoption of the Treaty on European Union creates a new legal subject, the Union citizen; all persons who possess the nationality of the member States shall be citizens of the Union (Article 8 EC). These citizenship provisions provide a core element in this novel dynamic entity, the EU. The figure of the Union citizen carries within itself the legacy of the internal market; more specifically, that entails in turn that both the citizen and the Union are shaped by concepts and values which are usually valorized as masculine. As a result these new legal concepts are vulnerable to critique from a feminist perspective which can in turn provide an important corrective to those unbalanced constructs.

The outline and contents of this new figure, the Union citizen, is almost entirely determined by existing, market-centred norms and practices. At a superficial level, the creation of the citizen appears a marketing exercise in its own right, the latest product in a line including Euro-passports, a Euro-flag and anthem, and sundry European years dedicated to worthy causes¹⁰. In this guise it can be seen as an additional attempt to legitimise or "sell" the idea of Europe to the very people, mainly ignorant or apathetic or sceptical about the Union, who have recently become its citizens. It has been claimed that the introduction of Article 8a-e EC means that 'the mobility of economically active persons has now been elevated to the core of European citizenship and expanded into mobility for persons generally. In other words: economically irrelevant people have been promoted to the status of persons'¹¹. However, these mobility rights are expressed as subject to the limitations already set out in the Treaty. The central figure, therefore, in the Union citizen's origin is the EC worker who enjoys rights under EC law when working, seeking work, or having worked, in another member State by virtue of Article 48 EC and associated legislation. For the most part these rights are taken up by those in work; a factor which already disadvantages women as a group. In 1991 the average female unemployment rate in the EC was 50 per cent higher than the average male rate¹². Another important consideration is that the ability and willingness of individuals to migrate is dependent on several factors, including real income differentials, attitudes to risk, and age¹³, as well as a variety of "push" and "pull" factors¹⁴. Given the uneven distribution of caring responsibilities between the sexes and, consequently, the greater exposure to risk from uncertainty for women, their opportunities for free movement are even further reduced. As such, we can argue that the configuration of rights set out in Article 8a-e EC renders the concept of Union citizen a sexist one, unevenly distributing its resources and opportunities on the basis of sex.

However, the Union citizen can be subjected to a feminist critique on a deeper level. A key point of concern must be the manner in which the Court of Justice has defined *who* is to be seen as economically active and so entitled to mobility rights; this certainly covers workers and persons who provide and receive services. The definition of worker produced by the Court of Justice is based on a requirement that the individual is involved in genuine and effective work as opposed to marginal and ancillary activities under the direction of an employer

for remuneration. The Court has fought shy of extending rights to a working relationship premised on a religious or philosophical basis, and in *Steymann*¹⁵ the Court held that this test did not cover the situation of a German member of a Bhagwan community in the Netherlands who carried out plumbing jobs and general chores for this religious community in exchanges for his lodgings and food. Given this approach it is unsurprising that the category of “worker” does not embrace women who are economically active within the home and do not engage in paid employment. The possibility of treating these women as workers might exist if traditional assumptions about the worth of work within the home were set aside, in light of the minimal value of the labour which a “worker” in EC law must produce. However, given the common assumption about the altruistic nature of this “private” labour, it is unlikely to be treated as an economic activity. Thus, in *Achterberg*¹⁶ the Court of Justice held that a woman who had not been in employment outside her home could not claim rights under EC law which was directed at workers as she ‘had not had an occupation.’ The jurisprudence of the Court still overlooks the value of a significant segment of the economically active female population. The core right of the citizen, that of mobility, remains anchored in the categories of economically active persons already established in EC law and is available to women in a more restrictive fashion than to men because of the Court’s failure to include in its decisions modes of economic existence which are informal, unstructured and largely experienced by women.

The rights of workers in EC law are extensive, encompassing rights to be accompanied by spouses, children and certain other relatives. However, these statuses have had to be defined by the Court and in doing so it has limited those rights. The manner in which the limits are applied reinforces heterosexual marriage and fails to adopt a more egalitarian model of inter-personal relations. In *Reed v. The Netherlands*¹⁷ the Court of Justice held that the long-term companion of a worker, who is a national of a member State and is employed in another member State, cannot be treated as his ‘spouse’ for the purposes of EC law. However, where Dutch nationals could obtain permission for their unmarried non-Dutch companions to reside with them, other EC workers could not be subject to discrimination because of their nationality (Article 6 EC) and could also obtain such permission. This judgement converts the relationship between an unmarried heterosexual couple into one where the presence of the partner who is not an EC worker is a “social advantage”, a material benefit for the other. *Reed* indicates that the attempt by women to define themselves as economic subjects rather than as objects to be traded¹⁸ is one on which EC law’s stance is ambiguous. It is not being claimed here that support for the institution of marriage is necessarily anti-feminist; however, as Katherine O’Donovan notes it is an institution which carries a deep history of oppression for women¹⁹. EC law has deliberately chosen to subscribe to that history. In addition, the view which the Court of Justice takes of marriage is a wholly formal one; it is not necessary that the spouses co-habit at any point or that there should be or ever have been any emotional or sexual relationship between them. Thus in *Diatta v. Land Berlin*²⁰ the Court found that where a marriage

had not been dissolved, it was to be treated as still existing even if the spouses were separated and had no intention of ever living together again.

When we look to see how this affects women, the creation of a new market can be seen. In London and other large cities located in member States with strict immigration laws, a market in EC (as opposed to host State nationals) workers who are unmarried lesbians has emerged in recent years. Such women cannot enter into a legally recognised spousal-like relationship with other women and they are likely to be less well-off than men. If they are EC workers they have a right to the residence of a spouse of theirs in the same member State, and this economically valuable right is, increasingly, being traded. The trade is, undoubtedly, one which occurs on a grey market but it is a real phenomenon. The creation of the European Union and the construction of a new model citizenship on the basis of the existing market order should be judged in light of this trade in women, a new variation on an old tale of female oppression which was authored by the European Community and is now continued by the European Union.

* A fuller version of this paper appears in Bottomley, *Feminist perspectives in the foundational subjects of law* (Cavendish: London, 1996). My thanks to participants in the workshop on European dimensions in the 'A World in Transition' conference, Lund, 14-16 June 1996; all responsibility for this work rests with myself.

Notes

1. L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (4th ed.) (1994) Sweet & Maxwell p.55.

2. Kirsten Schiewe, 'EC Law's unequal treatment of the family: The case law of the European Court of Justice on rules prohibiting discrimination on grounds of sex and nationality', (1994) 3 *Social and Legal Studies* p.241 at p.247.

3. Commission of the European Communities, *Television without frontiers* Green Paper on the Establishment of the Common Market for Broadcasting especially by Satellite and Cable, COM (84) 300 final (Luxembourg: OPOEC, 1984) p.6.

4. Case C-2/90, [1993] 1 CMLR 365.

5. Para. 16.

6. Para. 26.

7. David A. Demiray, 'The movement of goods in a green market', 1994/1 *Legal*

Issues of European Integration 73 at p.109. Emphasis added.

8. See also Rossa Phelan, 'Right to life of the unborn v Promotion of trade in services: The European Court of Justice and the normative shaping of the European Union', (1992) 55 *Modern Law Review* p.670; Ian Ward, 'In search of a European identity', (1994) 57 *Modern Law Review* p.315 at p.327.

9. Patricia J. Williams, 'On being the object of property', in *The alchemy of race and rights* (1991) Harvard University Press p.227. EC law is not so deferential toward art treasures as Williams might expect.

10. Cris Shore and Annabel Black, 'Citizens' Europe and the construction of European identity', in Victoria A. Goddard, Joseph R. Llobera and Cris Shore (eds.), *The Anthropology of Europe: Identities and boundaries in conflict*, (1994) Berg: Oxford pp.286-287.

11. Hans Ulrich Jessurun d'Oliveira, 'European citizenship: Its potential, its meaning' in Renaud Dehousse (eds.) *Europe after Maastricht: An ever closer Union?* (1994) Law Books in Europe: München p.132.

12. Mike Artis and Nick Weaver, 'The European economy', in M.J. Artis and N. Lee (eds.), *The economics of the European Union*, (1994) Oxford University Press pp.47-48.

13. D.G. Mayes, 'Factor mobility', in Ali M. El-Agraa (ed.) *The economics of the European Community* (4th ed.) (1994) Harvester Wheatsheaf p.441.
14. See Loukas Tsoukalis, *The new European economy: The politics and economics of integration* (2nd rev. ed.) (1993) Oxford University Press pp.153-154.
15. Case 196/87, [1988] ECR 6159.
16. Joined Cases 48, 106 & 107/88 *J.E.G. Achterbeg-te Riele and Others v. Sociale Verzekeringsbank, Amsterdam* [1989] ECR 1963.
17. Case 59/85, [1986] ECR 1283.
18. See Susanne Kappeler, 'The international slave trade in women; or procurers, pimps and punters', (1990) 1 *law and critique* p.219 at p.235.
19. Katherine O'Donovan, 'Marriage: A sacred or profane love machine?' (1993) 1 *Feminist Legal Studies* p.75.
20. Case 267/83, [1985] ECR 574.